U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: DEC 0 5 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the AAO on appeal. The AAO will withdraw the director's decision. Because the record, as it now stands, does not support approval of the petition, the AAO will remand the petition for further action and consideration.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences and as a member of the professions with progressive post-baccalaureate experience equivalent to an advanced degree. The petitioner seeks employment as a high school science teacher. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions with the equivalent of an advanced degree but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel. Counsel asserts: "The Director's decision is clearly based on obvious error in that it grossly misstates the essentials [*sic*] details underlying [the petitioner's] petition." Review of the record confirms that key facts did not receive consideration. Specifically, the petitioner intends to work as a high school science teacher, but the director's decision does not acknowledge or discuss this intended occupation. Instead, the director focused on the petitioner's present employment as a chemist at Pharmaceutical Innovations, Inc., Newark, New Jersey. These facts, by themselves, do not support approval of the petition, but they are so integral to the petition that the director should have taken them into account.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B)Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions with experience equivalent to an advanced degree under the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(k)(3)(i)(B). The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, P.L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dep't of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The term "prospective" is included here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien

cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner electronically filed the Form I-140, Immigrant Petition for Alien Worker, on November 12, 2012. Part 6 of that form, "Basic Information About the Proposed Employment," included the following information:

1. Job Title: 93 – Teacher
2. SOC Code: 25-1032
3. Nontechnical Description of Job: Teach courses pertaining to the application of physcial [*sic*]

Address where the person will work:
9.a. Street Number and Name: P.O. Box 500
9.c. City or Town: Trenton
9.d. State: NJ

Standard Occupational Classification (SOC) Code 25-1032 corresponds to "Engineering Teachers, Postsecondary." The sentence fragment stated on line 3, above, matches the first eight words of the O*NET-SOC job description corresponding to the SOC Code:

> Teach courses pertaining to the application of physical laws and principles of engineering for the development of machines, materials, instruments, processes, and services. Includes teachers of subjects such as chemical, civil, electrical, industrial, mechanical, mineral, and petroleum engineering. Includes both teachers primarily engaged in teaching and those who do a combination of teaching and research.[1]

Counsel later clarified that the petitioner seeks employment as a high school teacher. The SOC Code for that occupation is 25-2031.[2] The post office box identified above belongs to the New Jersey Department of Education, consistent with the petitioner's intended employment as a high school teacher.

On December 29, 2012, the director issued a request for evidence, stating that the petitioner had "failed to submit the required evidence in support of [the] petition." The director instructed the petitioner to submit evidence to satisfy the guidelines set forth in *NYSDOT*.

In response, counsel stated that that the petitioner had exhibited exceptional ability "in the areas of Chemistry and Engineering, as proven by his extensive experience and significant contributions to his employer, [redacted] – with regards to the design, development, manufacture and distribution of medical products and accessories." Counsel asserted that the "environmentally conscious and remarkably comprehensive pollution studies that [the petitioner]

[1] Source: http://www.onetcodeconnector.org/ccreport/25-1032.00 (printout added to record November 21, 2013).
[2] *See* http://www.onetcodeconnector.org/ccreport/25-2031.00 (printout added to record November 21, 2013).

conducted in 1986 as a Naval Lieutenant in Colombia provide further support for his scientific expertise and significant contributions to the field of science."

president of described the petitioner's work for that company:

> [The petitioner] has been employed by as a Chemist since April of 1996. . . .
>
> The main duty of his job is manufacturing ultrasound and conductivity gels and disinfectants to be used in the medical field.
>
> Other duties include quality control test of raw materials, packing materials, finished products and online filling of products.

Mr. stated the petitioner's job title as "Chemist," but on Form I-140, the petitioner identified his occupation as "Biomedical Engineer."

plant manager at stated:

> [The petitioner] is the true brain behind our company's unique scientific manufacturing process. His brilliant past contributions, and ongoing day-to-day role can be attributed to [the petitioner's] extensive experience working with particular chemical solutions in the context of complex manufacturing processes that are crucial to the functioning of our business.
>
> [The petitioner's] work is, and has always been, well above-average.

The director denied the petition on April 16, 2013. In the first paragraph of the denial notice, the director stated that "[t]he petitioner seeks to classify himself as a Travel Demand Modeler." On the fourth paragraph of page 3, the director stated: "USCIS finds that the petitioner work in an area of Chemistry and Biomedical Science(s) to be intrinsic merit [*sic*]. The petitioner is currently employed as a Chemist at New Jersey." On the third paragraph of page 4, the director stated: "the petitioner has been shown to be a competent Chemical Engineer whose skills and abilities are of value to his current employer." The director's decision did not discuss the petitioner's intended future employment as a teacher. Instead, the director limited discussion to the petitioner's work at

On appeal, counsel states that the director "clearly erred in failing to use the correct Proposed Job Title when adjudicating [the] I-140 Petition" and disregarded "evidence . . . about the country's ongoing critical need for new science teachers." Counsel asserts:

> USCIS' blatant disregard of the substantial evidence in the administrative record is simply unacceptable, and in the interests of justice and equity, the Director's decision should be set-aside on that basis alone. USCIS should therefore exercise its discretion in [the petitioner's] favor by reconsidering the merits of his I-140 petition and NIW request *de novo*.

The appearance of the phrase "Travel Demand Modeler" at the beginning of the decision is unexplained, but the remainder of the decision contains correct details regarding the petitioner's credentials and his past experience. It is evident that the reference to a "Travel Demand Modeler" is a one-time error, comparable to the petitioner's use of the incorrect SOC Code on Form I-140.

The director's finding that "the petitioner has been shown to be a competent Chemical Engineer whose skills and abilities are of value to his current employer" does not "grossly misstate[] the relevant fact of [the] petition" as counsel claims. The petitioner's current employer, [redacted] employs him as a chemist. The director's mention of chemistry, in reference to the petitioner's "current employer," does not signify a lack of attention to the record.

Nevertheless, counsel is correct that the evidence of record shows that the petitioner intends to work not as a chemist or chemical engineer, but as a high school science teacher. The director was mistaken about the petitioner's intended future occupation, and therefore could not come to a proper conclusion about the petitioner's prospective benefit to the United States. The AAO therefore withdraws the director's decision, and remands it for a new decision that takes the petitioner's intended teaching work into account.

This remand order is not an instruction for the director to approve the petition. Rather, it is an order to issue a new decision consistent with the facts in the record. The director's consideration of the record should take the following discussion into account.

The petitioner submitted copies of materials relating to his past and present work as a chemist and/or chemical engineer, but counsel did not state that the petitioner intends to continue working in that field. Rather, counsel stated that the petitioner's "proposed employment as a Bilingual Science Teacher is, undoubtedly, in this nation's best interest." In this regard, [redacted] stated:

> It is my understanding that [the petitioner] holds official teaching certificates in New Jersey and Florida. His experience working in the fields of chemistry, physics, biochemistry and engineering, coupled with his passion for these topics and love for teaching will undoubtedly grant underprivileged students with an incredible advantage they so desperately need. . . .
>
> [The petitioner's] fluency in Spanish will also allow him to educate this country's growing number of Spanish-speaking students, who will benefit from being able to learn in a language they understand. . . .

> [The petitioner's] contribution to public education in the fields of science and math will provide immediate relieve to those school districts, such as Newark, NJ, that are currently facing a shortage of educators in these subject area[s]. In the long run, having [the petitioner] remain in the U.S. working as a science teacher will create a nation-wide benefit, both to the country's scientific advancement, as well as to the nation's economy.

An "Examinee Score Report" from the Educational Testing Service showed the petitioner's scores on various PRAXIS Series tests between 2001 and 2003. The petitioner took "Content Knowledge" examinations for mathematics, chemistry, physics, and "general science," and received passing grades under New Jersey standards. The petitioner's math score (131) was below the passing level for Pennsylvania (136) but above passing level for New Jersey (130).

The petitioner submitted a copy of an "Official Statement of Status of Eligibility," indicating that the petitioner was "eligible for a Florida Educator's Certificate" to teach chemistry. This statement, issued in 2005, expired on December 1, 2008. The petitioner submitted no evidence of its renewal, and no evidence that he held a Florida Educator's Certificate (as opposed to evidence of eligibility for such a certificate).

On March 2003, the State of New Jersey issued a Certificate of Eligibility, indicating that the petitioner "is eligible to seek employment in positions requiring the Provisional Certificate" as a "Teacher of Physical Science."

A "Contingent Employment Contract" dated July 10, 2001 from the Newark (New Jersey) Public Schools offered the petitioner "employment in the position of Math Teacher . . . for the 2001-2002 school year . . . subject to the filing of the below mentioned documents/qualifications no later than September 1, 2001." The contract then listed 11 specific items. The copy of the contract shows check marks next to seven of the 11 items. The record does not show that the petitioner submitted all of the required items or actually worked for the Newark schools under the terms of this contract.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that his past record justifies projections of future benefit to the national interest. *NYSDOT* at 219. The petitioner's past record need not be limited to prior work experience. He must, however, have established, in some capacity, the ability to serve the national interest to a substantially greater extent than the majority of his colleagues. The petitioner must establish a past history of demonstrable achievement with some degree of influence on the field as a whole. In all cases the petitioner must demonstrate specific prior achievements which establish his ability to benefit the national interest. *Id.* at 219 n.6.

The record contains no evidence of the petitioner's past record as a teacher. The petitioner did not claim or document any past employment experience as a high school science teacher. Instead, the petitioner submitted general background evidence regarding science education and a shortage of math and science teachers in New Jersey.

With regard to the unavailability of qualified U.S. workers, the job offer waiver based on national interest is not warranted solely for the purpose of ameliorating a local labor shortage, because the labor certification process is already in place to address such shortages. *NYSDOT* at 218.

Whatever the petitioner's claimed achievements as a chemist or chemical engineer, he does not seek future employment in those fields, but rather as a high school teacher. The petitioner did not establish that his work as a classroom teacher would produce benefits that are national in scope. *Cf. NYSDOT* at 217 n.3.

The director did not consider the petitioner's intended teaching work, and for this reason that the AAO withdraws the director's decision and remands the petition for a new decision that takes the above facts into account.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The withdrawal of the director's decision is not a finding that the petitioner has met that burden.

ORDER: The director's decision of April 16, 2013 is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.